Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1973

NO. 74-1971

ROBERT LEROY STUDER, *Petitioner*

v.

STATE OF TEXAS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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Supreme Court of the United States

October Term, 1973

NO._____

ROBERT LEROY STUDER, *Petitioner*

v.

STATE OF TEXAS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Robert Leroy Studer, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the Court of Criminal Appeals of Texas entered in the above entitled case on April 17, 1974.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Criminal Appeals printed in Appendix A, hereto, *infra*, p. 13, and is reported in _____ S.W.2d _____.

JURISDICTION

The judgment of the Court of Criminal Appeals of Texas was entered on April 17, 1974. Petitioner's Mo-

tion for Leave to File a Motion for Rehearing was denied by said Court without written opinion on May 15, 1974. On August 13, 1974, Mr. Justice Powell extended the time in which to file a petition for a writ of certiorari to and including August 30, 1974. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

QUESTION PRESENTED

Where the petitioner was represented in the trial court by counsel of his own choosing, will the gross incompetence of such counsel be adequate grounds for asserting a violation of the Sixth Amendment guarantee of effective assistance of counsel? This question, involving one of the most fundamental rights vouchsafed to a defendant facing criminal prosecution in our society, received merely perfunctory treatment by the Court of Criminal Appeals. It held merely that ". . . ineffective assistance of retained counsel cannot be imputed to the State . . ."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."

Art. 29.06 of the Texas Code of Criminal Procedure provides:

In the first motion by the defendant for a continuance, it shall be necessary, if the same be on account of the absence of a witness, to state:

1. The name of the witness and his residence, if known, or that his residence is not known.

2. The diligence which has been used to procure his attendance; and it shall not be considered sufficient diligence to have caused to be issued, or to have applied for, a subpoena, in cases where the law authorized an attachment to issue.

3. The facts which are expected to be proved by the witness, and it must appear to the court that they are material.

4. That the witness is not absent by the procurement or consent of the defendant.

5. That the motion is not made for delay.

6. That there is no reasonable expectation that the attendance of the witness can be secured during the present term of court by a postponement of the trial to some future day of said term. The truth of the first, or any subsequent motion, as well as the merit of the ground set forth therein and its sufficiency shall be addressed to the sound discretion of the court called to pass upon the same, and shall not be granted as a matter of right. If a motion for continuance be overruled, and the defendant convicted, if it appear upon the trial that the evidence of the witness or witnesses named in the motion was of a material character, and that the facts set forth in said motion were probably true, a new trial should be granted, and the cause continued or postponed to a future day of the same term. Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Art. 29.07 of the Texas Code of Criminal Procedure provides:

Subsequent motions for continuance on the part of the defendant shall, in addition to the requisites in the preceding Article, state also:

1. That the testimony cannot be procured from any other source known to the defendant; and

2. That the defendant has reasonable expectation of procuring the same at the next term of court. Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Art. 29.08 of the Texas Code of Criminal Procedure provides:

All motions for continuance on the part of the defendant must be sworn to by himself. Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

STATEMENT OF THE CASE

Petitioner, a minister of the Gospel at St. Paul's New Testament Church in Houston, Texas was convicted on September 5, 1972, in a jury trial of the offense of fondling a minor male, and the jury assessed his penalty at 15 years in the Texas Department of Corrections. On the morning of the trial, Petitioner's counsel, Walter Conway, not then licensed to practice law,* filed a motion for continuance (his third, the first two having been granted on April 19, 1972, and July 5, 1972, respectively) based upon the fact that *none* of the nine witnesses he had subpoenaed on August 28, 1974, (nine days before the scheduled trial) had appeared in Court. Whether the subpoenas so applied for were

* It is illuminating to note that Mr. Conway has maintained neither a law office nor a telephone listing as an attorney for at least five years.

not served, or whether they were simply disobeyed, is unclear, and apparently outside the record. But because said continuance motion wholly failed to meet the statutory requirements of Art. 29.06 and 29.07 of the Texas Code of Criminal Procedure, the trial judge ordered Petitioner to stand trial forthwith. For the convenience of the Court, Petitioner's Motion for Continuance is quoted verbatim:

In The
DISTRICT COURT
Harris County, Texas
174th Judicial District

No. 172767

STATE OF TEXAS

v.

ROBERT LEROY STUDER

DEFENDANT'S MOTION FOR CONTINUANCE

To The Honorable Judge Of Said Court:

Comes now the Defendant, Robert Leroy Studer, appearing on this the 5th day of September, 1972 A.D. in the above styled and numbered cause, and respectfully moves the Court to grant a continuance in said cause for the reason that Defendant cannot safely go to trial in that, although he requested and applied with a verified application for 9 witnesses to be subpoenaed in said cause to appear on this the 5th day of September, 1972 A.D., that none of said witnesses has appeared, either because they have not been served, or because they have been served and have not obeyed the subpoena. Defend-

ant's said application for issuance of subpoenas was timely, being filed on August 28, 1972 A.D., nine days before trial. All of the witnesses but one are located here in Harris County, Texas, and some were previously subpoenaed and in Court.

Defendant says that he cannot safely go to trial without these witnesses; that their testimony is believed to be material to his cause; that this motion is not being made for delay or dilatory purpose, but is in good faith, and is made so that justice may be served, and so that Defendant may safely go to trial.

WHEREFORE, PREMISES CONSIDERED, Defendant prays the Court to continue this said cause, so that the attendance of the said witnesses can be procured.

Respectfully submitted,

WALTER CONWAY
Walter Conway,
attorney for Defendent

STATE OF TEXAS

COUNTY OF HARRIS

Before me, the undersigned authority, on this the 5th day of September, 1972 A.D., personally appeared Robert Leroy Studer, Defendant in the above styled and numbered cause, who being by me duly sworn, upon his oath stated that the facts alleged in the foregoing motion for continuance are true.

W. Pastor, Clerk.
In and for Harris County, Texas
174th Judicial District

Sept. 5, 1972 Defendant's 3rd Motion for Continuance denied.

E. B. Duggan, Judge.

In said Motion, Petitioner's trial counsel failed to state the names of the witnesses to be called, the diligence that had been used to procure their attendance, the facts which were expected to be proved by each witness, that the witnesses were not absent by the procurement or consent of the Petitioner, that their testimony could not be procured from any other source known to the Petitioner, etc., all of which, and more, were required by the said Articles 29.06, 29.07, and 29.08.

Forced to go summarily to trial, Petitioner's trial counsel was unable to obtain *any* witnesses in Petitioner's favor *during* the trial. The four-year-old boy who was allegedly fondled by Petitioner was ruled incompetent to testify *on the Court's own motion—without being so requested by Petitioner's counsel.* Petitioner's counsel made not the slightest effort to *attempt* to challenge the competence of the subject's six-year-old sister, as noted in the opinion of the Texas Court of Criminal Appeals. She testified, in response to leading questions of the prosecutor, that on the day in question she and her brother were in the trailer home of a babysitter, and were playing outside when the Petitioner invited them into his neighboring trailer home for some candy. Inside, she said that Petitioner fondled her brother by putting his "huevito" into her brother's back and by placing his hand on her brother's "huevito." Upon this testimony, the jury convicted Petitioner and assessed his 15-year penalty. Appeal was duly taken by other counsel to the Court of Criminal Appeals of Texas, the principal contention therein being incompetent trial counsel. The Texas Court did not remotely assert that Petitioner's trial counsel *was* competent, or reasonably effective, but deftly avoided the issue by holding only that ". . . ineffective assistance of

retained counsel cannot be imputed to the State . . ." Petitioner then retained his present counsel, who filed a Motion for Rehearing, urging once again the inexperience and incompetence of trial counsel as his *sole* ground for rehearing, but the Texas Court denied the motion without written opinion. See Appendix "B", p. 15.

ARGUMENT

This Court has held in innumerable cases, and with unbroken consistency, that ". . . the demands of due process of law in the fair administration of criminal justice . . ." are "fundamental." *United States v. Richard M. Nixon,* ____ U.S. ____ (1974). Certainly among these demands are the right to constitutionally satisfactory services from a defendant's trial counsel. If such counsel does not meet the minimum standards of effective assistance, a defendant is clearly denied a right which, being basic to a free society, the Courts have a logical duty to enforce. It is axiomatic that the particular circumstances of each individual case must be considered in determining whether an accused has been denied the effective assistance of counsel guaranteed by the 6th and 14th Amendments of the United States Constitution. *Avery v. Alabama,* 60 S.Ct. 321; *Chalk v. Beto,* 429 F.2d 225 (5th Cir.); *King v. Beto,* 429 F.2d 221 (5th Cir.), cert. den. 401 U.S. 936.

The test to be applied in determining whether counsel has provided constitutionally satisfactory services is not uniform throughout the Circuits, some holding that the criterion is whether the trial is a farce and a mockery of justice. But in the Fifth Circuit, it is the "reasonably effective assistance" standard of *MacKenna v. Ellis,* 280 F.2d

592, 599, cert. den. 368 U.S. 877. There, the Court said:

> "We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render *and rendering* reasonably effective assistance."

In *Herring v. Estelle*, 491 F.2d 125 (5th Cir., 1974), the Court thought that the two tests could be reconciled, saying:

> "The governing standard is reasonable effective assistance. One method of determining whether counsel has rendered reasonably effective assistance is to ask whether the proceedings were a farce or mockery. The farce-mockery test is but one criterion for determining if an accused has received the constitutionally required minimum representation (reasonably effective assistance). See Bendelow v. United States, 5th Cir. 1969, 418 F.2d 42, 50, cert. den., 91 S.Ct. 379. . . . One may receive ineffective assistance of counsel even though the proceedings have not been a farce or mockery. United States v. Edwards, 5th Cir. 1974, 488 F.2d 1154 at 1164, 1165. Other circuits may adhere solely to the farce-mockery test, but we do not. Pennington v. Beto, 5th Cir. 1967, 377 F.2d 950, 957-958. Our standard is reasonably effective assistance."

In applying these considerations to the instant case, it is helpful to consider, *seriatim*, the grievous blunders that Petitioner's trial counsel committed so that his claim of ineffective counsel will not be considered as rhetorical or lightly made:

(a) a failure or inability to subpoena witnesses thought by Petitioner to be vital to his defense;

(b) a failure or inability to file a satisfactory motion for continuance, so as to afford Petitioner an opportunity to obtain said witnesses in his favor for a subsequent trial;

(c) a failure, due presumably to "trial paralysis", to contact said witnesses by telephone for trial, when it appeared that the trial judge would demand trial of the Petitioner forthwith on the scheduled date;

(d) a failure, or inability, to challenge the competence of the six-year-old witness whose testimony was the *only* direct evidence introduced against Petitioner;

(e) a failure, or inability, to bring in any witnesses, even character witnesses, to testify on Petitioner's behalf, even though Petitioner was then a minister of the gospel at St. Paul's New Testament Church in Houston, Texas;

(f) a gross misconception of trial strategy in not having his client, the Petitioner, take the witness stand in his own behalf, even though Petitioner had denied committing the offense charged, and had no previous convictions, *either felony or misdemeanor,* within the preceding ten years.

Surely by any standard, Petitioner was entitled to rely on his attorney—*at the very minimum*—to bring in his church parishioners as witnesses to his character, or to alert them to be prepared to come to court on the date scheduled for trial. *This is not judging a lawyer by hind-*

sight. Such a gross lack of diligence amounts to a failure to exercise reasonable competence, even to the point of reducing the trial to a farce and a mockery of justice. It was clearly not ". . . within the range of competence demanded of attorneys in criminal cases." *McMann v. Richardson,* 397 U.S. 759, 90 S.Ct. 1441, 24 L.Ed.2d 763.

The Texas Court of Criminal Appeals blandly dismisses such gross incompetence because the counsel was of Petitioner's own choosing. The necessary effect of such judicial passivity is to *ignore* the constitutional demand that the accused shall have *effective* assistance of counsel, which means more than perfunctory, inexperienced, bungling, and incompetent representation. Petitioner submits that it means at least that the trial judge shall not, *actively or passively,* permit the accused to be deprived during the trial proceedings of the basic rights to which he is entitled by the "Due Process Clause" of the Fourteenth Amendment. A trial judge should be directed to ensure that the fundamental rights of an accused—among them, the right to subpoena witnesses in his favor and the right to challenge the competence of a *crucial* child witness—are protected, even from the slovenliness or incompetence of his own lawyer.

CONCLUSION

Because this case presents sharply the question of appropriate judicial policy in criminal cases where the accused is not represented by reasonably competent counsel of his own choice, and which policy is at variance

among the several Circuits, this Petition for the Writ of Certiorari should be granted.

Respectfully submitted,

BEN G. LEVY
Attorney for Petitioner
2244 W. Holcombe Blvd.
Houston, Texas 77025
713/665-7824

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of August, 1974, a copy of the foregoing Petition for the Writ of Certiorari was served upon counsel for Respondent, the Hon. John L. Hill, Attorney General of Texas, by mailing a copy thereof to him at P. O. Box 12548, Capitol Station, Austin, Texas 78711, through the United States Mail, postage prepaid.

BEN G. LEVY

APPENDIX A

ROBERT LEROY STUDER, Appellant

NO. 48,028 vs. Appeal From Harris County

THE STATE OF TEXAS, Appellee

OPINION

The appellant was convicted of the offense of fondling. The jury assessed his punishment at 15 years' imprisonment.

Appellant's first ground of error contends that the evidence was insufficient for the reason that the State's eyewitness, a six-year-old girl, contradicted herself in her testimony. The victim, a four-year-old boy, was ruled incompetent to testify.

We note initially that appellant made no challenge to the competency of the six-year-old witness (the victim's sister).

The little girl testified that on the day the offense occurred, she and her brother, the victim, had been taken by their parents to a babysitter. The babysitter and appellant resided in neighboring trailer houses.

The witness testified that she and her brother were playing outside when the appellant invited them into his trailer and offered them candy. They accompanied him, and once inside, appellant removed his trousers and pulled down the victim's pants. The witness stated that she saw appellant put his "huevito" into her brother's back and put his hand on her brother's "huevito." Later testimony revealed that the witness used the the term "huevito" to refer to the private parts.

Appellant contends that the testimony of the witness was conflicting and unreliable. However, it is well established that the credibility of a witness is a matter for the jury to determine. See Pizano v. State, 489 S.W.2d 284 (Tex. Crim. App. 1973) and Angle v. State, 486 S.W.2d 308 (Tex. Crim. App. 1972). Appellant's first ground of error is without merit.

Appellant's last two grounds of error urge that he received ineffective assistance of counsel at his trial. These contentions are based upon counsel's failure to properly request a continuance to obtain missing witnesses, and upon the fact that at the time of trial, counsel had not paid his bar dues and was therefore not a member in good standing of the State Bar of Texas. The record reveals that appellant's trial counsel was retained.

With regard to counsel's improper request for continuance, no error is presented. It is settled that the ineffective assistance of retained counsel cannot be imputed to the State. See Kincaid v. State, 500 S.W.2d 487 (Tex. Crim. App. 1973) and cases there cited.

With regard to appellant's contention that his counsel was not a member in good standing of the bar, reliance is had upon Martinez v. State, 318 S.W.2d 66 (Tex. Crim. App. 1958). This decision was expressly overruled in Hill v. State, 393 S.W.2d 901 (Tex. Crim. App. 1965). That decision effectively answers appellant's third ground of error.

The judgment is affirmed.

PER CURIAM

(Delivered April 17, 1974)

APPENDIX B

COURT OF CRIMINAL APPEALS OF TEXAS

CLERK'S OFFICE

Austin, Texas, May 15, 1974

Dear Sir:

I have been instructed to advise that the Court has this day denied "Leave To File" the Appellant's Motion for Rehearing in Cause No. 48,028,

ROBERT LEROY STUDER

vs.

THE STATE OF TEXAS, Appellee.

Sincerely yours,

GLENN HAYNES, Clerk

FILED
OCT 11 1974
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

NO. 74-197

ROBERT LEROY STUDER,
Petitioner

v.

STATE OF TEXAS,
Respondent

On Petition for Writ of Certiorari
To The Court of Criminal Appeals
of Texas

RESPONDENT'S BRIEF IN OPPOSITION

Henry Wade
District Attorney
Dallas County, Texas

W.T. Westmoreland
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

* * *

NO. 74-197

ROBERT LEROY STUDER,
Petitioner

v.

STATE OF TEXAS,
Respondent

Petition For A Writ of Certiorari
To The Court of Criminal Appeals
of Texas

* * *

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

Petitioner seeks to review the per curiam opinion of the Court of Criminal Appeals of Texas, No. 48,028, decided April 17, 1974. Per curiam opinions of this Court are not reported, but a copy of the opinion is appended to the Petition.

JURISDICTION

The formal jurisdiction requisites would seem to be satisfied; however, Respondent dis-

putes that any right guaranteed by the United States Constitution has been denied to Petitioner.

QUESTIONS PRESENTED

1. Did Petitioner's employed, state trial court attorney provide effective assistance of counsel to Petitioner?

2. If such counsel of Petitioner's choosing was imcompetent, can this ineffectiveness be imputed to the State and be a ground for reversal of the case?

3. Can this Court determine the question of incompetency of counsel, if such incompetency is a ground for reversal, on the record of the case as it now exists?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner asserts that the right to counsel provision of the Sixth Amendment to the United States Constitution is involved.

Also pertinent are Articles 29.06, 29.07 and 29.08 of the Texas Code of Criminal Procedure. These Articles set out the requirements for motions for continuance filed in the state courts of Texas and are reproduced in the Petition.

STATEMENT OF THE CASE

Petitioner was convicted of fondling a minor

male by a jury and assessed a term of imprisonment of 15 years.

The evidence adduced at the trial showed that Petitioner invited Patrick Elizondo a boy of four, and his sister Elizabeth Elizondo into his house trailer which was located in the same park as the Elizondo Trailer, offering candy as an inducement. Once inside the trailer, Petitioner removed his trousers and pulled down Patrick's pants. Petitioner put his private parts against Patrick's back and placed his hand on Patrick's private parts.

Patrick and Elizabeth left Petitioner's trailer when an older sister, Cynthia Elizondo, came to look for them. Once at the Elizondo trailer, Patrick told his father what had happened. The father, armed with a pistol, attempted to locate Petitioner, but Petitioner could not be found in his house trailer. The father than complained to the Houston police and Petitioner's arrest and trial followed.

After affirmance of the judgment of conviction by the Texas Court of Criminal Appeals, these certiorari proceedings were instituted.

ARGUMENT AND AUTHORITIES

Petitioner asserts that Petitioner's trial counsel was incompetent for failing to comply with the Texas continuance statutes thus generating a trial without defense witnesses. Petitioner also questions his trial attorney's acquiescence in the trial courts ruling that the four year old Patrick was incompetent to testify and the attorneys failure

to call Petitioner as a witness in his own behalf.

1. The Record Before This Court Does Not Support Petitioner's Claim That His Trial Counsel Was Incompetent.

Petitioner was indicted on January 13, 1972. On April 10, 1972, Petitioner's first attorney filed a motion for discovery requesting, in part, the names of witnesses to be called by the prosecution, any written statements of the witnesses and their grand jury testimony. Then, on the 19th of April, the initial attorney applied to the Court for permission to withdraw as counsel for the reason that Petitioner "has employed other counsel to represent him." The motion to withdraw was approved on said date, and a motion for continuance was likewise granted.

Represented by his new attorney, Walter Conway, Petitioner again moved for and was granted a continuance on July 5, 1972. However, at the next setting of the case, on September 5, 1972, Petitioner's third motion for continuance was overruled. As Petitioner asserts, this third motion was statutorily deficient.

This repeated seeking of continuances suggests that such motions were made for delay and not for the stated reason that Petitioner had witnesses that were important to his defense. This conclusion is at least reasonably inferrable from the circumstances of three motions grounded upon the failure of witnesses to attend the court settings. The inference is rendered stronger since at no

time, at the trial on the direct appeal and in the Petition filed in this Court, has Petitioner ever set out the expected testimony of the missing witnesses and attempted to demonstrate the materiality of the testimony.

Likewise, the fact that Petitioner's attorney had not paid his bar dues, Petitioner's decision not to appear as a witness and the acquiescence of his attorney in the court's disqualification of four year old Patrick disclose no evidence of incompetency. First, the fact that the attorney had not paid his state bar dues, without more, does not demonstrate incompetency of counsel. (See Beto v. Barfield, 391 F2d 275 (5 Cir. 1968) Second, there may be many reasons that Petitioner decided against testifying including arguendo, the possibility that he was fearful of cross-examination as to like conduct with the Elizondo's and other children at the trailer park. Such cross-examination would be permitted under Texas law. (See Gephart v. Beto (5 Cir. 1971), 441 F2d 319, Cert.den 40 U.S. 966. Third, the ruling that Patrick's incompetence to testify can be said to be favorable to Petitioner -- one less witness against him. Moreover, the record indicates that the ruling was proper since Patrick did not know his age and did not know the difference "between telling a story and telling the truth."

As above indicated, the circumstances surrounding the trial simply do not support the conclusion that Petitioner's attorney was incompetent or that Petitioner was deprived of the effective assistance of counsel.

2. Arguendo, If Petitioner's Counsel Was Incompetent, Such Deficiency Should Not Be Charged To The State of Texas.

The first eight Amendments to the United States Constitution, the so-called Bill of Rights, apply to federal action or inaction. By operation of the Fourteenth Amendment "No State shall. . . deprive any person of life, liberty or property, with out due process of law; nor deny to any person with in its jurisdiction the equal protection of the laws" the Court has held that the protection and requirements of the first eight Amendments are enforceable in state criminal prosecutions.

It is apparent that a State must, in some way, be a part of the process by which some right guaranteed by the first eight Amendments is denied to a state defendant.

Such is not the case here. Petitioner discharged one attorney and opted for another of his own choosing. The State of Texas had no part in this circumstance, and so cannot be held chargeable or accountable for the Petitioner's decision in hiring his attorney. Howard v. Beto, 375 F.2d 441 (5th Cir. 1967).

While it is lamentable and sometimes sympathy provoking, that defendants may elect to use the services of attorneys who are not as able and knowledgeable as other lawyers, to formulate a rule that a judgment should be vitiated because of the comparative incompetence of employed coun-

sel, would cause chaos in the administration of justice, both criminal and civil (remembering that there can be no deprivation of "property" without due process of law). A defendant need only to hire incompetent counsel for his first entry into courts, knowing that a second trial is in the offing should the first round or trial be decided adversely to him.

Thus, imputing the lack of ability to a State will add to the tangled jungle that already surrounds the criminal trial.

Accordingly, even if Petitioner's hired counsel was incompetent, there exists no constitutional basis for reversing the judgement of conviction.

But

3. Whether Or Not Petitioner's Trial Counsel Was Incompetent, Whether Or Not Such Incompetence Should Be Imputed To The State, The Record Before This Court Does Not Support The Granting Of Judgement Reversal In Certiorari Proceedings.

All that is readily apparent at this stage of the proceedings (aside from several other, but minor, claimed errors) is that Petitioner's attorney filed a motion for continuance which did not meet Texas' statutory requirements and which was overruled by the state trial court.

As noticed above, the inadequate motion

could have been filed only for delay. The witnesses referred to may not have been seriously wanted by the defense. Petitioner may not have been able to satisfy the continuance statute by showing the materiality of their expected testimony.

Even now, Petitioner gives us no reason to suppose that the witnesses referred to in his Motion for Continuance would have been in any way helpful in defending against the State's case.

With record in its present posture, the issuance of a writ of certiorari is inappropriate. Only habeas corpus proceedings, state and/or federal, can properly illuminate the question of the competency of Petitioner's trial attorney.

CONCLUSION

For the reasons advanced above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Henry Wade
District Attorney
Dallas County, Texas

John L. Hill
Attorney General of Texas

Larry F. York
First Asst. Atty. General

W.T. Westmoreland
Asst. District Atty.
Dallas County, Texas

Joe B. Dibrell
Assistant Attorney General

Lonny F. Zwiener
Assistant Attorney General

Attorneys for Respondent

P. O. Box 12548
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Austin, Texas 78711

CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, do hereby certify that a copy of the above and foregoing Respondent's Brief in Opposition has been served by placing the same in the United States Mail, postage prepaid, certified, on this the ____ day of October, 1974, addressed as follows: Ben G. Levy, 2244 W. Holcombe Blvd., Houston, Texas, 77025.

LONNY F. ZWIENER
Assistant Attorney General